

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1171

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIE J. GRIFFIN,

Appellant.

Appeal from a Judgment of Conviction
Rendered in the United States District
Court for the Southern District of New York

APPELLANT'S BRIEF

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INTENTIONALLY AND KNOWINGLY VIOLATE THE NARCOTICS LAWS
OF THE UNITED STATES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

-against-

WILLIE GRIFFIN,

Appellant.

-----x

ISSUES PRESENTED

1. Whether the presence of Appellant WILLIE GRIFFIN in the premises 117 W. 116th Street, and in the area of 116th Street where the narcotic transactions are alleged to have occurred constituted acts to make him a co-conspirator.
2. Whether the act of driving a car in which a passenger is alleged to have transported a narcotic drug sufficient to establish that the appellant was involved in the sale of the narcotics.

STATEMENT PURSUANT TO RULE 28 (a) (3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Knapp, J) rendered on January 26, 1977 convicting Appellant after trial by jury of conspiracy (Title 21, United States Code, Section 812, 841 (a) (1) and 841 (b) (1) (A), and distributing and possessing with intent to distribute a Schedule I controlled substance (Title 21, United States Code, Sections 812, 841 (a) (1) and 841 (b) (1) (B); Title 18, United States Code, Section 2.), and sentencing the appellant to a term of imprisonment for a period of seven and one-half (7½) years on each of counts one and nine to run concurrently with each other; followed by a three (3) year period of special parole.

Timely notice of appeal was filed on March 21, 1977.

Appellant Willie Griffin is presently serving the sentence pursuant to the judgment herein.

B. Statement of Facts

Appellant was charged in two (2) counts of a twelve (12) count indictment including one count of conspiracy to violate the narcotics laws of the United States, and one count of distributing a Schedule I narcotic drug controlled substance on 13 February, 1976.

The Appellant pleaded not guilty to both charges and did not testify nor offer any evidence on either charge.

TRIAL

The Appellant and five others were indicted as co-conspirators and were each charged with various violations of the narcotics laws.*

*

The 12 counts indictment named Appellant Willie Griffin in counts one nine, co-defendants Codell Griffin, Kenneth Ivery, Thomas Boykin, Robert Burnside and Donna Forte were each charged in the first count and named in various other counts of the indictment. The co-defendants, Burnside, Boykin and Forte were acquitted; the co-defendant Kenneth Ivery was convicted and did not appeal; the co-defendant was convicted and is a co-appellant herein.

The principal witness against the appellant was James Bryant who testified that he had seen the appellant on occasions in certain premises on West 116th Street T. 80 (8-25)*, and he had also seen the appellant in premises 117 W. 116th Street where certain narcotics transactions had taken place T. 82 (2-25).

The witness also testified that there were occasions in September, 1975 when the witness purchased narcotics from the appellant T. 93 (8-25), T. 95 (3-22).

The witness testified that he had an extensive criminal record and was currently under indictment by the State of New York, and that he had been given money by the Drug Enforcement Agency to effect his release on bail T. 58 (21), T. 59 - 61,62 (2-12), T.260 (2-23).

The appellant is the brother of Codell Griffin, a co-appellant, who was the principle defendant and the prime target of the investigation that was being conducted by the Drug Enforcement Agency. The witness, James Bryant, agreed to cooperate with the D. E. A. in their investigation of Codell Griffin.

On 13 February 1976 the appellant drove a black Mercury automobile to West 116th Street in the vicinity of certain premises at which time the appellant parked the car, exited and walked a short distance where he met with his brother, Codell Griffin T. 124, 125, T. 961 (16-25), T. 962 (3-25). Meanwhile, a passenger, designated as "Roy", got out of the car carrying a bag T. 125 (6-8) and proceeded to, and entered certain premises on West 116th Street T. 961-963.

Subsequently, the witness, James Bryant, and appellant's brother Codell Griffin entered the same premises at which time Roy came downstairs to the hallway and handed two packages containing a narcotic drug to James Bryant T. 125 (17-19).

During this episode in the hallway, the appellant was not present T.126 (20-22) according to the witness, James Bryant. However, according to the testimony of the Drug Enforcement Agent, Samuel Blackburn, who was not in the hallway, the appellant was present in the hallway during the transaction T. 963 (4-13).

On 4 March, 1976 the witness, James Bryant, placed a telephone call to 117 West 116th and asked to speak with Codell Griffin, the appellant's brother. James Bryant was informed that Codell Griffin was not at the premises and the appellant was brought to the telephone. The conversation was to the effect that Codell Griffin was not there T. 127 (12-19).

Subsequently, there was an occasion where Agent Samuel Blackburn, operating in an undercover capacity attempted to converse with the appellant but he received no response from the appellant T. 137 (3-21).

There was further testimony by James Bryant that on 5 March, 1976 there was conversation between him and the appellant wherein James Bryant expressly stated that he was not interested in the appellant T. 146 (17-19) but was concerned only with seeing the appellant's brother.

Appellant was convicted on counts one and nine.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT WILLIE GRIFFIN WAS PART OF A CONSPIRACY TO UNLAWFULLY INTENTIONALLY AND KNOWINGLY VIOLATE THE NARCOTICS LAWS OF THE UNITED STATES

Taken in the light most favorable to the government the evidence against appellant Willie Griffin shows only an isolated transaction which does not permit an inference of wilful and continuous participation in the conspiracy.

"The gist of the offense of conspiracy ... is agreement among conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." United States v. Falcone, 311 U. S. 205 at 210 (1940). The essence of the crime of conspiracy is agreement.

Recasting the evidence in the light most favorable to the government, the proof was that appellant Willie Griffin drove a person designated as "Roy" to 117 W. 116th Street where it was claimed that "Roy", the appellant's brother Codell Griffin along with Willie Griffin sold heroin to James Bryant. This entire transaction took place within a matter of minutes in a conspiracy which alleged to have covered a period of at least five years.* Other than this evidence there is nothing to link Willie Griffin with the conspiracy.

charged. We recognized that this Court has held a single transaction may or may not be sufficient to infer participation, that it is the nature of a single transaction itself which determines whether or not that transaction supports an inference of participation.

It is clear that if the purpose of a conspiracy is to distribute and possess with intent to distribute heroin, there will be some who may associate with the conspirators themselves. See United States v. Aviles, 274 F. 2d 179 cert. denied 362 U.S. 974 (1960); United States v. Reina 243 F. 2d 302 (2d Cir. 1957) cert. denied 354 U.S. (1957); United States v. Koch 113 F. 2d 982 (2d Cir. 1940); United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938).

Since every sale, purchase, delivery or act of distribution of narcotics by definition involves an agreement of two persons, the separate and distinct crime of conspiracy is not established by every act to sell, buy, deliver or distribute narcotics. United States v. Zueli, 137 F. 2d 845 (2d Cir. 1963). Therefore, the isolated fact of a purchase or delivery of narcotics from a conspirator does not necessarily permit an inference that the purchaser is a conspirator.

* The issue of appellant's mere presence at the scene is argued in POINT II herein

Where the evidence against a defendant consists only of a single transaction, then that single transaction must be scrutinized to see if it permits an inference of knowing entry and wilful participation in the conspiracy. As this Court said in Unites States v. Aviles, supra:

"A single act may be the foundation for drawing the actor within the ambit of the conspiracy. (Citation omitted) But since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonable infer from it such intent." (272 F.2d at 189).

In a case where the proof has been merely that of a single transaction of narcotics, logic would appear to demand and this Court has consistently held that it is insufficient proof of entry into an participation in a conspiracy.

In turning to the facts of this case, it is preliminarily noted that not all of the evidence may be reviewed to see if the single transaction rule applies. Proof of a defendant's entry into a conspiracy may only be shown by independent non-hearsay evidence. On this point this Court said in United States v. Reina, 242 F. 2d 302 (2d Cir. 1957)

".... We may not consider any declarations of the proved conspirators, such as Orsini or Shillitani, for these were hearsay until Valachi's connection with the conspiracy was proved by other evidence. "(242 F. 2d at 306).

The quantum of proof required to independently establish defendant's entry into a conspiracy before hearsay may be considered is a fair preponderance. United States v. Geaney, 417 F. 2d 116 (2d Cir. 1969) cert. denied 397 U.S. 1028; United States v. Calabor, 449 F. 2d 885 (2d Cir. 1971).

It is submitted that the observed acts of Willie Griffin on February 13, 1976 regarding his presence on 116th Street in the premises at 117 W. 116th Street do not amount to a fair preponderance of the evidence on the question of whether Willie Griffin may be

said to have joined the conspiracy.

Although the indictment alleges an ongoing conspiracy from September, 1971 until October, 1976, this act just recited, all on the single day of February 13, 1976 is the only independent non-hearsay evidence against Willie Griffin.

In United States v. Reina, supra, the defendant Valachi sold heroin to a conspirator Shillitani who later sought him out to complain about the quality of the drugs. Hearing of the bad narcotics Valachi responded:

" I can do nothing. It is the way I get it, it is the way I give it. I give you my word I never touch it. The way I get it it is the way I give it to you. Any further time I can make good for it, let us see."

(242 F. 2d at 305)

That conversation could be interpreted that Valachi had dealt with Shillitani in the past and expected to do so in the future. This Court, however, declined to hold Valchi was a member of the conspiracy, stating that while his sale was not inconsistent with membership in a larger venture, it was equally consistent with his being a independent seller of narcotics, whom Shillitani selected as the most immediately available source of supply.

While it is true that the cases under the former law also dealt with the issue of knowledge of illegal importation, which issue is not present in the case at bar, these cases are, it is submitted, instructive because they show that membership in the conspiracy was not found even though there was clear uncontroverted independent no-hearsay evidence of at least a single narcotics transaction, in contrast to the facts of this case, where even that question of proof is not met.

In United States v. Stromber 268 F. 2d 256 (2d Cir. 1959), Snyder a customs agent, was to have delivered a large quantity of heroin to two conspirators. In reversing his conviction this Court said:

" We also think that the conviction of appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin to Vellucci and Ewing in Hoboken. In United States v. Reina,

2nd Cir., 242 F. 2d 302, certiorari denied sub nom. Maccio v. United States, 354 U. S. 913, 77 S. Ct. 1294, 1L. Ed. 2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For ought that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction."

In United States v. Aviles, 274 F. 2d 179 (2d Cir. 1960), the proof showed that the defendant Rodriguez purchased narcotics from a central conspirator Cantellops. This Court reversed even assuming Rodriguez knew that the narcotics were illegally imported. The Court reasoned that there was no evidence that Rodriguez was a regular customer of Cantellops and an insufficient basis for assuming that he knew Cantellops was an agent for an existing con-

spiracy. The Court went on to state:

" The single purchase alone was not enough to prove that Rodriguez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriguez knew of the conspiracy and associated himself with it."

(274 F. 2d at 190).

Similarly the government failed to prove that Willie Griffin knew of a conspiracy and associated with it.

The cardinal point in the case at bar is that there is not a preponderance of the non-hearsay evidence that Willie Griffin joined the conspiracy, regardless of how the facts are colored by the hearsay testimony.

Considering both the cases discussed above and the evidence in the record, taken in the light most favorable to the government, it is submitted that the proof shows either nothing at all or at most an isolated single transaction without a sufficient basis in the record to infer that appellant Willie Griffin entered into and participated in the conspiracy; therefore, the conviction for the count of conspiracy must be reversed and that count dismissed as to appellant Willie Griffin.

POINT II

THE GOVERNMENT FAILED TO ESTABLISH
THAT APPELLANT WILLIE GRIFFIN UNLAW-
FULLY, WILFULLY AND KNOWINGLY DIS-
TRIBUTED AND POSSESSED WITH INTENT
TO DISTRIBUTE A SCHEDULE I CONTROLLED
SUBSTANCE

The presence of an individual at the scene of a crime with knowledge that a crime is being committed, is insufficient to convict him as an aider and abettor. Nye & Nissen v. United States, 336 U.S. 613 (1949); United States v. Gargiulo, 310 F. 2d 249 (2d Cir. 1962), United States v. Ramirez, 363 F. 2d 33 (9th Cir. 1966), United States v. Barber, 429 F. 2d 1394 (3d Cir. 1970); United States v. Hendrix, 327 F. 2d 971 (5th Cir. 1964). In the present case even viewed in the light most favorable to the government, the evidence against appellant Willie Griffin did not prove complicity beyond his limited presence at the scene.

Since Willie Griffin never uttered a word to the agent or to James Bryant, the informer-conspirator, that he had stake in the heroin venture or participated to aid its success, and there being testimony from the government's witness James Bryant that Willie Griffin never handled the heroin nor was he present during the transaction, the inference of guilt must derive solely from his activities. Essentially, these consisted of driving "Roy" to

117 W. 116th Street speaking with his brother Codell Griffin, in a conversation neither the agent or Bryant heard, and entering the premises. There was no evidence presented that Willie Griffin was present in the hallway of the building when price and quantity were discussed and Bryant testified that Willie Griffin was not present in the hallway when the exchange of the money was made and when Bryant received the drugs.

Willie Griffin's presence does not even approach mere presence at the scene with knowledge that a crime was in the process of commission. Thus, since even presence at the purchase of narcotics with knowledge of what is going on is insufficient to create an aider and abettor (United States v. Ramirez, 363 F. 2d 33, supra), Willie Griffin's appearance is less culpable.

Though aiding and abetting does not require any exercise of dominion or control over the drugs, it does require some stake in the venture and some wilful association to make it succeed (United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938); United States v. Falcone, 109 F. 2d 579 (2d Cir. 1940), Willie Griffin's driving a car does not prove any of these elements. In sum, Willie Griffin's presence in a car does not approach the role of the defendant Torbert in United States v. Hendrix, 327 F. 2d 971. supra, where she drove with other defendants to various stores and banks in a fraudulent check chashing scheme, an activity which was insufficient to convict her as an aider and abettor.

Consequently, in the absence of any proof that appellant Willie Griffin had a stake in the venture or wilfully associated with the crime to make it succeed, appellant Willie Griffin was not shown to have been an aider and abettor. His conduct does not support sufficient participation in the criminal act of selling of the heroin or in furtherance of any such plan to complete such a sale. Johnson v. United States, 195 F. 2d 673 (8th Cir. 1952).

POINT III

PURSUANT TO THE FEDERAL RULES OF
APPELLATE PROCEDURE, RULE 28 (i)
ALL RELEVANT ARGUMENTS RAISED IN
THE BRIEF FOR THE OTHER APPELLANT
ARE INCORPORATED BY REFERENCE

CONCLUSION

THE JUDGMENT OF CONVICTION ON
BOTH COUNTS SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED OR
IN THE ALTERNATIVE REMANDED TO
THE DISTRICT COURT FOR A NEW
TRIAL

Respectfully submitted,

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May 13, 1977

WELLS

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 16 day of May, 1977 at
No. 1 St. Andrews Pl., NYC

deponent served the within *Brief*
upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
16 day of May 1977.

[Signature]
Edward Bailey

[Signature]
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978

U.S. Attorney
Southern District of New York
1 St. Andrews Plaza
New York, N.Y.